

INTERSPOUSAL IMMUNITY—TIME FOR A REAPPRAISAL

Fisher v. Toler

194 Kan. 701, 401 P.2d 1012 (1965)

On October 19, 1962, defendant, husband of plaintiff, filed for divorce. In October, 1963, about eight months after being awarded an absolute decree of divorce, plaintiff filed suit against her former husband for assault and battery. She alleged in her petition that in December, on the day after an order directing the parties not to molest each other was entered, defendant, travelling at about 80 miles per hour after running a red light, rammed his car into the back of plaintiff's car, which she had been driving at a reasonable rate of speed. She further alleged that he then deliberately rammed into her car three more times while she was still inside. Defendant's answer included the defense that the parties were husband and wife when the alleged incident occurred. He subsequently moved for a judgment on the pleadings and a determination of a question of law prior to trial which the trial court granted on the ground that Kansas law prohibits suits between spouses in tort for personal injuries sustained during marriage.¹ The plaintiff appealed, and the judgment was affirmed by the Supreme Court of Kansas principally on the authority of its prior decision in *Sink v. Sink*,² which held that the common law rule of interspousal immunity had not been abrogated in Kansas by the Married Women's Property Act.³

By leaving plaintiff with no remedy for her injuries, the instant case demonstrates the dogged persistence of an ancient rule of law which continues to defeat meritorious claims in a majority of American jurisdictions. This rule holds simply that neither spouse may sue the other in tort for personal injuries received during coverture. The origin of this doctrine is uncertain, but it is clear that at common law spouses were barred from suing each other; the wife because of the notion that husband and wife were one and she did not have legal existence; the husband because he was liable for her torts and would therefore be suing himself.⁴ Today a majority of jurisdictions rigidly apply the immunity,⁵ but a substantial minority have abolished it.⁶

¹ *Fisher v. Toler*, 194 Kan. 701, 702, 401 P.2d 1012, 1013-14 (1965). There was some dispute in the parties' briefs in the Supreme Court of Kansas as to the content of plaintiff-appellant's petition. Compare Brief for Appellant, pp. 2-4, with Brief for Appellee, pp. 2-4. The facts above are from the supreme court's quotation from plaintiff's petition, except for the allegation of speed which appears only in plaintiff's brief.

² 172 Kan. 217, 239 P.2d 933 (1952).

³ Kan. Stat. Ann. §§ 23-201 to 23-207 (1964). The most pertinent section of that act provides: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried." Kan. Stat. Ann. § 23-203 (1964).

⁴ See Stewart, Husband and Wife § 48 (1887).

⁵ Jurisdictions in the majority include: *Delaware*: Saunders v. Hill, 202 A.2d 807 (Del. Sup. Ct. 1964); *Florida*: Corren v. Corren, 47 So. 2d 774 (Fla. Sup. Ct. 1950); *Amendola v. Amendola*, 121 So. 2d 805 (Fla. Dist. Ct. App. 1960); *Georgia*: Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937); *Wright v. Wright*, 81 Ga. App. 721, 70

The split of authority on this question has given rise to a voluminous literature, almost all of which opposes the immunity.⁷

S.E.2d 152 (1952); *Hawaii*: Hawaii Rev. Laws § 325-5 (1955), appears to put Hawaii in the majority, "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife"; *Illinois*: Ill. Ann. Stat. ch. 68, § 1 (Smith-Hurd 1959); *Indiana*: *Henneger v. Lomas*, 145 Ind. 287, 293, 44 N.E. 462, 464 (1896); *Hunter v. Livingston*, 125 Ind. App. 422, 123 N.E.2d 912 (1955); *Iowa*: *In re Dolmage's Estate*, 203 Iowa 231, 212 N.W. 553 (1927); *Kansas*: *Fisher v. Toler*, *supra* note 1; *Louisiana*: La. Rev. Stat. Ann. § 9:291 (1965) (bars action during marriage); *Gremillion v. Caffey*, 71 So. 2d 670 (La. App. 1954) (allows suit after divorce); *Maine*: *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Maryland*: *Ennis v. Donovan*, 222 Md. 536, 161 A.2d 698 (1960); *Massachusetts*: *Mass. Laws. Ann. ch. 209, § 6* (Supp. 1964); *Callow v. Thomas*, 322 Mass. 550, 78 N.E.2d 637 (1948); *Michigan*: *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Minnesota*: *Poepping v. Lindemann*, 268 Minn. 30, 127 N.W.2d 512 (1964); *Mississippi*: *Ensminger v. Ensminger*, 222 Miss. 799, 77 So. 2d 308 (1955); *Missouri*: *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. Sup. Ct. 1959); *Montana*: *Kelly v. Williams*, 94 Mont. 19, 21 P.2d 58 (1933); *Nebraska*: *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927); *Nevada*: *Morrisett v. Morrisett*, 80 Nev. 566, 397 P.2d 184 (1964); *New Jersey*: *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958); *New Mexico*: *Rogers v. Galindo*, 68 N.M. 215, 360 P.2d 400 (1961); *Ohio*: *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); see note 12 *infra*; *Pennsylvania*: Pa. Stat. Ann. tit. 48, § 111 (1965), *Meisel v. Little*, 407 Pa. 546, 180 A.2d 772 (1962); *Rhode Island*: *Castellucci v. Castellucci*, 188 A.2d 467 (R.I. Sup. Ct. 1963); *Tennessee*: *Prince v. Prince*, 205 Tenn. 451, 326 S.W.2d 908 (1959); *Texas*: *Turner v. Turner*, 385 S.W.2d 230 (Tex. Sup. Ct. 1964); *Latiolais v. Latiolais*, 361 S.W.2d 252 (Tex. Supp. App. 1962); *Utah*: *Rubalcava v. Gissemann*, 14 Utah 2d 344, 384 P.2d 389 (1963); *Vermont*: *Comstock v. Comstock*, 106 Vt. 50, 169 Atl. 903 (1934); *Virginia*: *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952); *Washington*: *Goode v. Martinis*, 58 Wash. 229, 361 P.2d 941 (1961) (immunity unless marital bond broken prior to tort, *i.e.*, legal separation); *West Virginia*: *Campbell v. Campbell*, 145 W. Va. 245, 114 S.E.2d 406 (1960); *Wyoming*: *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943); *District of Columbia*: *Thompson v. Thompson*, 218 U.S. 611 (1910); *Mountjoy v. Mountjoy*, 206 A.2d 733 (D.C. Munic. Ct. App. 1965).

⁶ Jurisdictions in the minority include: *Alabama*: *Bennett v. Bennett*, 224 Ala. 335, 140 So. 378 (1932); *Alaska*: *Cramer v. Cramer*, 379 P.2d 95 (Alaska Sup. Ct. 1963); *Arkansas*: *Leach v. Leach*, 227 Ark. 599, 300 S.W.2d 15 (1957); *California*: *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rep. 102 (1962); *Colorado*: *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *Connecticut*: *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Idaho*: *Lorang v. Hays*, 69 Idaho 440 209 P.2d 733 (1949); *Kentucky*: *Brown v. Gosser* 262 S.W.2d 480 (1953); *New Hampshire*: *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *New York*: N.Y. Gen. Obligations Law § 3-313; *North Carolina*: N.C. Gen. Stat. § 52-5 (Supp. 1965); *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965); *North Dakota*: *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932); *Oklahoma*: *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1939); *Oregon*: *Smith v. Smith*, 205 Ore. 286, 287 P.2d 572 (1955) (negligent tort suit disallowed); *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955) (intentional tort suit allowed); *South Carolina*: *Pardue v. Pardue*, 167 S.C. 129, 166 S.E. 101 (1932); *South Dakota*: *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941); *Wisconsin*: *Wis. Stat. Ann. § 246.07-.075* (1957); *Fehr v. Gen. Acc. Fire & Life Assur. Corp.*, 246 Wis. 228, 16 N.W.2d

Most writers have observed that the trend is definitely toward the minority view,⁸ which seems borne out by changes over the last 50 years.⁹ By 1939 ten states had removed the immunity; today the figure stands at 17, and recently the barriers have partially given way in two additional states.¹⁰ However, nearly all state courts of last resort now have decided this issue on first impression,¹¹ and it is apparent that courts once having refused to remove the immunity generally are unwilling to reverse their position.¹²

787 (1944); *Arizona*: There are no reported cases from Arizona, but *Jaeger v. Jaeger*, 262 Wis. 14, 53 N.W.2d 740 (1954), construes Arizona's statutes as authorizing interspousal suits.

⁷ See, e.g., 1 Harper & James, Torts § 8.10 (1956); Prosser, Torts § 116, at 879-85 (3d ed. 1964); Farage, "Recovery for Torts Between Spouses," 10 Ind. L.J. 290, 300 (1935); McCurdy, "Torts Between Persons in Domestic Relations," 43 Harv. L. Rev. 1030, 1035 (1930); Sanford, "Personal Torts Within the Family," 9 Vand. L. Rev. 823 (1956).

⁸ 1 Harper & James, Torts § 8.10, at 645 (1956); Prosser, Torts § 116, at 884 (3d ed. 1964). But see Sanford, *supra* note 7, at 831.

⁹ Seven states removed the immunity between 1914-1924, two states between 1925-1934, three states between 1935-1944, two states between 1945-1954, and three states between 1955-1964. Two states not included in the preceding have restored the immunity, Illinois, by statute, in 1953, Ill. Ann. Stat. ch. 68, § 1 (Smith-Hurd 1959), and Utah, judicially in 1963, *Rubalcava v. Gissemann*, *supra* note 5.

¹⁰ *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955) (intentional torts); *Goode v. Martinis*, 58 Wash. 2d 229, 261 P.2d 941 (1961) (suit allowed for tort occurring after participants legally separated).

¹¹ Only two states do not have any reported high-court cases in this area, i.e., Arizona and Hawaii.

¹² Only three states have expressly reversed their position by judicial decision: *California*: *Klein v. Klein*, *supra* note 6 (lifting immunity); *Kentucky*: *Brown v. Gosser*, *supra* note 6 (lifting immunity); *Utah*: *Rubalcava v. Gissemann*, *supra* note 5 (restoring immunity). However, some courts have reached an opposite result over a span of several decisions without expressly reversing previous decisions. First, certain specific exceptions to the immunity under different fact patterns are created. See Prosser, *op. cit.* *supra* note 7, at 884. This can lead to decisions in which the exception is adopted as the rule without reversal of earlier cases or to decisions limiting perhaps quite broad language in the exception. The recent actions of the Supreme Court of Ohio is an example of the latter. Prior to 1965, Ohio was classified with the minority as a result of its holding in *Damm v. Elyria Lodge*, 158 Ohio St. 107, 107 N.E.2d 337 (1952). This case, considered by the court as one of first impression, held that a wife could sue her husband's lodge. In arriving at this decision after reviewing the majority and minority cases, the court used language apparently embracing the minority view: "In Ohio, the Constitution and the pertinent statutes have the effect of so modifying the common law rule as to authorize the maintenance of the action by the plaintiff against her husband and consequently against the defendants." *Id.* at 121, 107 N.E.2d at 344. Although the court's syllabus only granted specifically the right to sue a spouse's lodge, Judge Taft in a later case commented in dictum that in Ohio a wife has a cause of action against her husband for willful and negligent acts, citing *Damm* as authority for this observation. *Lowman v. Lowman*, 166 Ohio St. 1, 9-10, 139 N.E.2d 1, 6-7 (1956). Nevertheless, in *Lyons v. Lyons*, *supra* note 5, the court specifically barred interspousal tort suits for negligence. The court

Superficially, the battleground of this controversy is statutory interpretation. Common law ideas of husband and wife were gradually changed in this country by the Married Women's Property Acts which purport to give the wife a legal identity of her own.¹³ In effect in every jurisdiction in this country,¹⁴ these statutes are almost uniformly looked to by the courts to determine whether the common law doctrine concerning interspousal tort suits has been changed. The majority courts argue that these statutes, few of which are addressed specifically to interspousal tort immunity,¹⁵ do not create a new right of action where none existed before, and if a change is to be made, the legislature must make it.¹⁶ The minority courts retort that these statutes should be construed liberally to give effect to the usually apparent legislative intent to abolish the legal identity of husband and wife and to allow interspousal suits without exceptions.¹⁷ However, it is plain that statutory construction does not provide the ratio decidendi of these cases, for analysis on this basis does not reconcile their results.¹⁸ Examination of the opinions shows that courts construing essentially similar statutes often reach opposite results,¹⁹ and others find that statutes which apparently remove all disabilities of coverture do not authorize interspousal suits in tort.²⁰ It has even been held that while the wife can sue the husband, the husband cannot sue the wife.²¹ Since it cannot seriously be asserted that these courts still

admitted that language in *Damm* seemed to indicate an opposite result but noted that, since such language was not written into the syllabus, they were not bound by it. The court expressly distinguished *Damm* as involving only a suit against an unincorporated association. It should be noted that the syllabus in *Lyons* specifically holds only that an action is barred for negligence "where the married parties are living together as husband and wife at the time of the alleged injury." *Id.* at 243, 208 N.E.2d at 534. The court thus appears to have provided for further distinctions at a later date.

¹³ For a compilation and classification of the statutes see McCurdy, "Personal Injury Torts Between Spouses," 4 Vill. L. Rev. 303, 310-13 (1959).

¹⁴ *Id.* at 310.

¹⁵ *Id.* at 312-13.

¹⁶ See, e.g., *Thompson v. Thompson*, 218 U.S. 611 (1910); *Lyons v. Lyons*, *supra* note 5; *Fisher v. Toler*, *supra* note 1; *Ennis v. Donovan*, *supra* note 5.

¹⁷ See, e.g., *Rains v. Rains*, 97 Colo. 19, 25, 46 P.2d 740, 743 (1935); *Courtney v. Courtney*, 184 Okla. 395, 400-01, 87 P.2d 660, 665-66 (1939). Yet in the instant case a statutory prohibition against strict construction of statutes in derogation of the common law and a direction for liberal construction were ignored. See Kan. Stat. Ann. § 77-109 (1964).

¹⁸ *McKinney v. McKinney*, 59 Wyo. 204, 216-17, 135 P.2d 940, 943 (1943) (after attempting to reconcile the cases).

¹⁹ *Ibid.* Compare Kan. Gen. Stat. Ann. § 23-2-3 (1964), with S.C. Code § 10-216 (1962) which was construed as authorizing interspousal suits. See also *Pardue v. Pardue*, 167 S.C. 129, 136, 166 S.E. 101, 103 (1932).

²⁰ See *Prince v. Prince*, 205 Tenn. 451, 326 S.W.2d 908 (1959), construing Tenn. Code Ann. § 36-601 (1955) which begins: "Married women are fully emancipated from all disability on account of coverture. . . ."

²¹ *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949); *Fehr v. Gen. Acc. Fire and Life Assur. Corp.*, 246 Wis. 288, 16 N.W. 2d 787 (1944). The results of these

think that the husband and wife are "one," the basis of the common law rule, their decisions must be based on the policy arguments discussed in support of their view that the statutes do not allow the suits.

To decide whether or not the immunity is justified under the social conditions prevailing today, the policy arguments advanced to support or controvert the rule thus must be examined.

The principal argument made for retention is that to allow interspousal tort suits for personal injuries would be disruptive of the marital relation and therefore against public policy.²² This argument is basically illogical since suits are allowed between husband and wife even for torts based on property rights,²³ and there is nothing less disruptive about these suits.²⁴ Furthermore, where there has been any intentional tort worthy of suit, it is doubtful that any domestic harmony remains to be protected. There must have been little congeniality before the tort, since a beating or the like occurred, and certainly afterward there is even less, for one spouse has, over the objection of the other, willingly filed a lawsuit and continues to prosecute it. The latter fact similarly undermines the credibility of the disruption-of-marital-harmony argument in negligence cases although concededly the occurrence of the tort does not reflect on the spouses' relationship. It can be further argued that in intentional tort cases and in negligence cases where insurance is not a factor, the suit is brought because the negligent spouse has failed to make all possible provision for the care of the victim. This behavior again reflects bad feeling, is inconsistent with a durable marriage, and on the positive side points out the need for a compensatory remedy. In negligence cases where insurance is involved, the domestic harmony argument is not applicable at all since an insurance company would be paying the damages and rather than straining the relationship, the suit would result in financial gain for the family.

The majority courts further argue that the closeness of the family relationship opens the door to fraud and collusion against insurance companies, and it is therefore against public policy to allow interspousal tort suits.²⁵ By so arguing, these courts actually evade a public responsibility transcending the protection of insurance companies against false claims—the responsibility to distinguish the meritorious claim from the fraudulent.²⁶ Beyond this, the argument applies only to negligence claims since liability insurance policies do not usually protect intentional tortfeasors.²⁷

cases were soon changed by statute and now both spouses have a right of action. See N.C. Gen. Stat. § 52-5 (1965); Wisc. Stat. Ann. §§ 246.07 to 246.075 (1957).

²² See, e.g., *Sink v. Sink*, *supra* note 3, at 219, 239 P.2d at 934; *Campbell v. Campbell*, 145 W. Va. 245, 248, 114 S.E.2d 406, 408 (1960); *Prosser, op cit. supra* note 7, at 883.

²³ 1 Harper & James, *Torts* § 8.10 (1956).

²⁴ *Self v. Self*, 58 Cal. 2d 683, 690, 376 P.2d 65, 69, 26 Cal. Rep. 97, 101 (1962); *Prosser, supra* note 7, at 883.

²⁵ See, e.g., *Smith v. Smith*, 205 Ore. 286, 310-11, 287 P.2d 572, 583 (1955) (distinguishing negligent from intentional torts).

²⁶ *Klein v. Klein, supra* note 6, at 696, 376 P.2d at 73, 26 Cal. Rep. at 105.

²⁷ *Id.* at 699, 376 P.2d at 75, 26 Cal. Rep. at 107 (dissent).

Most feared is the area of automobile accident claims. The most likely possibility here is that a spouse-passenger, after an accident resulting from the negligence of a spouse-driver, would invent injuries and sue the driver spouse to collect the insurance. Other situations are possible, such as staging an intentional collision of two cars, each driven by a spouse. Is the possibility of undetected collusion and eventual collection in these cases so great as to require the immunity? This is doubtful for a number of reasons. Guest statutes in effect in twenty-seven jurisdictions²⁸ would eliminate a large number of the passenger-spouse cases. As in any other case expert medical evidence must be introduced and the extent of any injuries claimed must be proven. Since the insurance company will probably have complete control over the defense of the suit,²⁹ the company's attorney will be able to avail himself of available judicial techniques, such as cross-examination and discovery procedures, to help ferret out fraud. Moreover, if the defendant takes too many steps to aid the plaintiff by making false statements or by otherwise refusing to cooperate, the policy's cooperation clause enables the insurance company to avoid liability.³⁰

If the company still finds that the risk of collusion is too great, it can protect itself by excluding the risk from all its policies or by charging an additional premium to insure such risk, thereby protecting the company where protection is needed most without the necessity of a blanket immunity.³¹

Other arguments made for the retention of the doctrine are that the spouse has a remedy in divorce or criminal proceedings³² and that to allow a tort remedy would flood the courts with every possible sort of insignificant claim.³³ As to the first of these arguments, divorce is per se destructive of the marriage relation and criminal proceedings would seem to be more productive of disharmony than the allowance of a remedy in tort; thus, this argument is inconsistent with what is supposedly the basic policy behind the immunity. Further, from the victim's standpoint, divorce and criminal proceedings are illusory as remedies since neither compensates the victim. As for flooding the courts, this has not, in fact, happened.³⁴ Indeed, every contact which might give rise to torts between strangers could not be actionable as between husband and wife. The nature of the marriage relationship implies consent to physical contacts and personal dealings sustained in the ordinary course of the marriage and for these there would be no liability.³⁵

It is thus at least questionable whether policy considerations standing alone justify the retention of the common law immunity. When applied to

²⁸ Am. Jur. 2d Desk Bk., Doc. No. 123 (1962).

²⁹ 2 Richards, Insurance § 361 (1952).

³⁰ Metropolitan Cas. Ins. Co. v. Richardson, 81 F. Supp. 310 (S.D. Ill. 1948).

³¹ State Auto. Mut. Ins. Co. v. York, 104 F.2d 730, 734 (4th Cir. 1939).

³² Ensminger v. Ensminger, 222 Miss. 799, 805, 77 So. 2d 308, 310 (1955).

³³ Thompson v. Thompson, 218 U.S. 611, 617-18 (1910).

³⁴ Klein v. Klein, *supra* note 6, at 694, 376 P.2d at 72, 26 Cal. Rep. at 104.

³⁵ See McCurdy, *supra* note 7, at 1055; Prosser, *op cit. supra* note 7, at 883.

a fact situation such as that presented by the instant case, their invalidity is even more apparent. Any domestic harmony surviving an assault and battery at eighty miles per hour is certainly too hardy to require protection. Furthermore, at the time of the incident, divorce proceedings had been instituted; thus, domestic harmony, if that is important, was already at a minimum. Because of the evident ill-feeling between the parties and the fact that no liability insurance policy would cover such claims, no possibility of collusion existed.

One possibility for the disposition of such a fact situation is to create exceptions to the immunity as one jurisdiction has done for intentional torts³⁶ and two or three for torts occurring after legal separation.³⁷ Certainly this approach is preferable to a mechanical application of the immunity in all cases, and under the instant facts, failure to make an exception does not seem justifiable even if it is felt necessary to retain the immunity in part. It is, however, submitted that a complete elimination of the immunity is preferable to the making of exceptions. Such an approach accords with the modern philosophy that a remedy be made available for those unjustifiably injured by another's conduct.³⁸

Complete abrogation is consistent with the spirit of the Married Women's Property Acts and does not in fact pose a threat to domestic harmony. Indeed, in cases involving insurance, it would actually help the relationship by relieving the financial strain resulting from hospital and medical expenses and loss of income. Besides for protection against liability, people buy insurance out of a human desire to provide for the victims of their negligent conduct, and it seems strange that those for whom that protection is usually most desired are unable to avail themselves of it.³⁹ The collusion threat, if it is a threat, can be met in the ways suggested above.

³⁶ See cases cited from Oregon *supra* note 6. Generally, the courts have not made a distinction between negligence and intentional torts. See Annot., 43 A.L.R.2d 641 (1955). The California Supreme Court recently rejected the opportunity to make this distinction. *Self v. Self*, *supra* note 24; *Klein v. Klein*, *supra* note 6. Judges Schauer and McComb, who concurred in the decision in *Self* removing the immunity for intentional torts, dissented in *Klein* on the ground that because of possible collusion, the immunity should be retained for negligence.

³⁷ See authority cited from Washington (legal separation) and Louisiana (divorce), *supra* note 5. Compare *Steele v. Steele*, 65 F. Supp. 329 (D.D.C. 1946), allowing suit based on a tort occurring between entry of an absolute divorce decree and its effective date six months hence, with cases cited from the District of Columbia, *supra* note 5. An exception for torts occurring after an interlocutory decree may exist in Utah. Compare *Rubalcava v. Gissemann*, *supra* note 5, at 351, 384 P.2d at 394, with *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954).

³⁸ *Taylor v. Patten*, *supra* note 37, at 410, 275 P.2d at 700 (concurring opinion); *Rozell v. Rozell*, 281 N.Y. 106, 110-13, 22 N.E.2d 254, 256-57 (1939); *Koplik v. C. P. Trucking Corp.*, 47 N.J. Super. 196, 202-03, 135 A.2d 555, 559 (1957), *overruled* 27 N.J. 1, 141 A.2d 34 (1958).

³⁹ See *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943) (concurring opinion), where the judge in arguing as above went so far as to suggest that interspousal negligence suits should be allowed only where there was liability insurance.

Total abrogation also tends to protect a spouse, if the oft-discussed deterrent effect of tort remedies in fact exists.⁴⁰ The facts of the instant case illustrate that there are periods of bitterness during some marriages attended by substantial possibilities of violence. Why does a spouse not deserve as much as anyone all of the law's protection against this violence, as well as against any abnormal carelessness that might be prevented by the removal of the immunity? Weighing the advantages, especially the obvious desirability of making a remedy available to all with a valid claim, against the justifications thus far advanced for retention, it seems clear that the desirable solution is total elimination of the immunity.

The mechanical application of the immunity in situations not requiring it and at a time when no real legal or policy basis for it exists in part results from the approach of the courts in purporting to interpret statutes while actually deciding on the basis of policy considerations. By not specifically stating that the retention of the immunity is based upon a judicial evaluation of policy considerations which would be subject to judicial reversal, the majority courts establish precedent which dictates that any change must be left to the legislature.⁴¹ Thus courts examining the issue in the future feel precluded from judicially abrogating the immunity even though policy does not justify its retention.⁴²

However, a way out of this dilemma exists if the courts take the approach that the immunity is of common law origin and remains subject to judicial alteration if not changed by statutes.⁴³ Certainly few statutes specifically require the application of the immunity, nor must the courts hold that the legislature has impliedly sanctioned the immunity by not specifically removing

⁴⁰ Taylor v. Patten, *supra* note 37, at 410, 275 P.2d at 700 (concurring opinion).

⁴¹ See Ennis v. Donovan, 222 Md. 536, 541-43, 161 A.2d 698, 700-02 (1959); Koenigs v. Travis, 246 Minn. 466, 468-72, 480, 75 N.W.2d 478, 481-83, 487 (1956), cited in Shumway v. Nelson, 259 Minn. 319, 107 N.W.2d 531 (1962), where the court pointed out that the "rationale of the common law rule is no longer persuasive." Yet, it was felt any change must be made by the legislature.

⁴² In Steele v. Steele, *supra* note 37, the court declared itself bound to follow the Supreme Court's construction of the District of Columbia Married Women's Property Act in Thompson v. Thompson, *supra* note 5, although finding the policy basis "more of a rationalization of a preconceived notion than of bona fide reasoning leading to logical conclusion," and although disagreeing with the principle of statutory construction upon which *Thompson* was based—that statutes in derogation of the common law are to be strictly construed. Although the court in *Steele* finally distinguished *Thompson*, it did not feel competent to challenge expressly the statutory construction itself. One might well ask whether a lower court would feel so strongly bound by a higher court's 60-year-old expression of policy. Yet in the instant case even the statutory construction basis of *Thompson* did not exist. See note 17 *supra*.

⁴³ In the Oregon cases, Smith v. Smith, *supra* note 6; Apitz v. Dames, *supra* note 6, the court recognized that since the Oregon statutes did not specifically preclude interspousal tort suits, it was free to develop judicially a proper and original common law approach. See the thorough discussion of the role of the courts in the area of interspousal immunity in Koplik v. C. P. Trucking Co., 27 N.J. 1, 13, 141 A.2d 34, 41 (1958) (dissent).

it, in view of the inadequacy of the policy considerations thus far set forth in support of it. It is hoped that the majority courts will soon follow the lead of one judge who said:

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule . . . Changes of this character should not be left to the legislature.⁴⁴

⁴⁴ Wheeler J. in *Dwy v. Conn. Co.*, 89 Conn. 74, 99, 92 Atl. 883, 891 (1914), quoted with approval in Cardozo, *The Nature of the Judicial Process* 151 (1921).